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ONTARIO'S WATCHDOG

Losing the Waiting Game

Ombudsman Report

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Final Report

Investigation into Unreasonable Delay at the Ministry of Community and Social Services' Ontario Disability Support Program's Disability Adjudication Unit

"Losing the Waiting Game"

André Marin
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Losing the Waiting Game

1 Alyce and Henry Aukema are remarkable individuals. In 1987, the Aukemas, already parents to four children between the ages of five and 14, began the process of adopting a fifth child. The child they wished to adopt was not simply any child, she was special. The baby girl they wanted had been born with club feet (that could be surgically corrected), but also a rare condition known as congenital myotonic dystrophy. This condition weakens multiple tissues and organs. The Aukemas were told by one doctor that the baby, Lyndsey, could die at any time. In fact, at the age of three months, Lyndsey ended up in hospital in total arrest. This led to brain swelling, an induced coma, and resulting neurological damage. In addition to her previous disabilities, Lyndsey now had cerebral palsy and severe developmental delay. Some officials suggested that she was too severely disabled to be adopted. However, the Aukemas were resolute in their desire to nurture Lyndsey. They brought her home to their farm north of Strathroy, Ontario, and embraced her as one of their family. Alyce's training as a registered nurse was certainly an asset, as the Aukemas willingly took on the monumental task of raising a child with severe disabilities. It takes a lot of energy and determination to navigate the system to ensure that a child with disabilities obtains the medical, educational and social supports they are entitled to. It takes a special kind of person and the Aukemas are such special people. However, now in their 50s, the Aukemas face additional challenges. Alyce was recently diagnosed with a serious medical condition. Her health is at risk from the physical and emotional stress of caring for Lyndsey. Lyndsey's needs are also increasing. This fall the Aukemas had to build an addition onto their home to accommodate her wheelchair access. On top of the difficulty this situation presents, the Aukemas have had to endure a bureaucratic nightmare in their attempts to obtain financial assistance for Lyndsey through the Ontario Disability Support Program, a government program designed to help adults with disabilities.

2 The Aukemas did receive some financial assistance over the years to help defray the costs involved in meeting Lyndsey's needs. Most recently through the local children's aid society they were receiving $500 a month for a subsidized adoption. However, this support was due to end May 14, 2005, when Lyndsey turned 18, and with this event looming, Henry Aukema contacted the Ontario Disability Support Program in November 2004, aware that once she was officially of age, Lyndsey would be entitled to benefits through that program. Henry says he was told that her case would not even be considered until February, at which point he returned to request assistance. The Aukemas' physician submitted the necessary forms in April 2005. By letter dated April 28, 2005, the Program confirmed receipt of the information and stated that Lyndsey would be contacted

as soon as a determination was made as to whether she qualified for benefits as a person with a substantial disability. And then began an extended and inexplicable waiting period.

3 Lyndsey suffers from multiple disabilities, she has problems with mobility (requiring the use of a walker and wheelchair), personal care, and toileting, she is prone to seizures, is essentially nonverbal, has no sense of danger, and must be closely supervised at all times. Attendants come into the home five times a week to bathe her and three times a week to prepare her for school. Given Lyndsey's condition, the Aukemas were confident that she would receive the income support she was entitled to dating from her 18th birthday. In fact, when they first went to the Ontario Disability Support Program office to do financial intake, Henry says they were told, "oh there's no problem, she's eligible." However, by November 2005, a year after they had initially approached the Ontario Disability Support Program, the Aukemas were growing progressively impatient. They had still not heard anything back on Lyndsey's application and they had been told in a letter sent to them in April by the Director of the Program that decisions could not be given over the phone.[1] They explained that if you phoned the London Office all you got was a recording saying, "due to the high volume of calls we cannot take your phone call now, please leave your name and number and we'll call you back within two business days." The Aukemas were not in a position where they could sit by a phone and wait for two days. So, in October 2005, they enlisted the aid of their Member of Provincial Parliament to find out what had happened to Lyndsey's application for social assistance.

4 It was not until December 21, 2005, eight months after their initial application, that a letter was sent confirming that Lyndsey had been found to be a person with a substantial disability as defined in the *Ontario Disability Support Program Act, 1997*. Finally, the Aukemas had received the decision, which had been a foregone conclusion from the outset: Lyndsey was found to be entitled to benefits. However, there was a catch. By letter dated January 20, 2006 an Income Support Specialist advised Lyndsey that her entitlement was approved effective August 21, 2005 not May 14, 2005, the date she turned 18. She received a retroactive grant of $3,179.03 based on benefits of $730 per month. The Aukemas had been paying Lyndsey's drug and other expenses from May 15, 2005 fully expecting reimbursement. The Program's decision meant that Lyndsey, and the Aukemas, were out about $2,500. The reason for this disentitlement - the regulations under the *Ontario Disability Support Program, 1997* did not permit payment of

[1] An April 28, 2005 letter from the Director of the Ontario Disability Support Program to Lyndsey Aukema, stated "Please note, staff will not be able to advise you of a decision over the telephone." The Ministry advised this is based on its policy to provide all decisions in writing to ensure clarity and protect privacy.

retroactive benefits beyond four months. Lyndsey had become disentitled to income support benefits, not because she was uncooperative or tardy in applying, not because her medical condition did not warrant it, but because of abject delays in the Ontario Disability Support Program's processing of applications through the Disability Adjudication Unit.

5 On January 18, 2006 Henry Aukema wrote to my Office to complain about the unfair impact of the Ministry's delay, saying:

> Why is this not retroactive till her birthday? We did all in our power to get the paper work on time and succeeded. Why are we being penalized for the government's inability to get its work done on time? Lyndsey is entitled to this money, how can it be withheld? ....What a way for the government to save money. ...deny the helpless their legally entitled support.

Investigative Process

6 During the period March 1, 2005 to February 28, 2006, the Ombudsman's Office received 71 complaints from applicants for Ontario Disability Support Program benefits, like Lyndsey Aukema, who complained that they had waited for up to ten months to receive a decision on their applications. These individuals also complained that because of the long processing delays, they lost out on benefits, as the regulations under the *Ontario Disability Support Program Act, 1997*, limit retroactive payment of benefits to a maximum of four months. On March 1, 2006, I wrote to Kevin Costante, Deputy Minister, Ministry of Community and Social Services, notifying him of our intention to investigate whether there are unreasonable delays at the Ministry's Ontario Disability Support Program's Disability Adjudication Unit in assessing applications for support benefits, and whether such delays were leading to applicants being deprived of benefits, which they would otherwise be entitled to. Since commencing this investigation, we have received 69 more complaints about this issue for a total of 140 complaints.

7 On March 3, 2006, the Deputy Minister replied to the notice of investigation, assuring us that we would have the Ministry's full cooperation in the matter.

8 This investigation was conducted by the Special Ombudsman Response Team. A number of individuals directly affected by Ontario Disability Support Program delays were interviewed, as well as staff of Community Legal Clinics who assist vast numbers of such individuals each year. Ministry officials were also

interviewed. All formal interviews were tape-recorded. Ministry files, policies and statistical information were reviewed. The SORT team had completed interviews and the bulk of its investigation by March 29, 2006. On March 20, 2006 additional information was requested from the Ministry including statistics for 2004 and 2005 on the length of time taken to deal with Ontario Disability Support Program applications by the Disability Adjudication Unit. This was provided on April 18, 2006. The Ministry only began keeping comprehensive statistics relating to the length of time taken by the Disability Adjudication Unit to decide Ontario Disability Support Program applications in 2005. The Ministry undertook to provide statistics for 2004, but its production was delayed, as the Ministry had to assemble the data and confirm its accuracy. In addition, the Ministry encountered delays obtaining applicant files from archives.

The History of the Ontario Disability Support Program

9 As Canadians, we acknowledge the value of providing supports for the injured, disabled, and unemployed. Our stability as a society is reflected in our ability to assist those on the margins of our communities. As part of the "Social Safety Net" that has been constructed, Ontario provides funding for a range of services and supports. The Ministry proudly boasts on its website:

> For 75 years, the Ministry of Community and Social Services has provided the transitional supports and programs to which Ontario's most vulnerable turn when they need a helping hand.

10 Undeniably, one of the most vulnerable groups in Ontario is those who are afflicted with disabilities and unable to support themselves. In June 1997, the then Minister of Community and Social Services introduced the *Social Assistance Reform Act, 1997*. At that time, she stated that the Act would fulfill two key commitments in the Conservative government's political platform, the Common Sense Revolution. The Act would fully implement mandatory work-for-welfare through the *Ontario Works Act, 1997*, and it would create a separate income support program for people with disabilities under the *Ontario Disability Support Program Act, 1997*. Before June 1, 1998, social assistance for individuals with disabilities was provided under the *Family Benefits Act*. While that Act still has some limited application, since June 1, 1998, the *Ontario Disability Support Program Act, 1997* has served as the mainstay of the social safety net for low income Ontarians with disabilities. In order to assess what went wrong in the administration of the Ontario Disability Support Program, it is first necessary to understand how the Program was intended to work.

How the Ontario Disability Support Program was Intended to Work

11 The Ontario Disability Support Program provides income support, including health and other benefits for people with disabilities who are in financial need, and employment supports for people with disabilities who can and want to work. The Ministry has stated that the intent of the Ontario Disability Support Program is to provide the supports necessary to enable individuals and families to live as independently as possible in the community and lead more productive, dignified lives.[2]

12 The *Ontario Disability Support Program Act, 1997* provides that its purpose is to establish a program that,

(a) provides income and employment supports to eligible persons with disabilities;
(b) recognizes that government, communities, families and individuals share responsibility for providing such supports;
(c) effectively serves persons with disabilities who need assistance; and
(d) is accountable to the taxpayers of Ontario.

The maximum total monthly allowance available under Ontario Works for a single person is $536, compared to $959 under the Ontario Disability Support Program. Additional support may be provided for the spouse and dependents of an eligible applicant.[3]

13 In order to establish eligibility under the *Ontario Disability Support Program Act, 1997*, individuals must be 18 years of age or older, meet financial need requirements, and come within the fairly stringent definition of "person with a disability" set out in section 4 of the Act. Section 4 provides that a person is a person with a disability if:

(a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;

(b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and

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[2] ODSP Income Support Policy Directives
[3] The recent Budget announced a 2 per cent increase of social assistance, which will come into effect on November 30, 2006 for Ontario Disability Support Program and December 1, 2006 for Ontario Works.

(c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

The Act also restricts eligibility if an individual is drug or alcohol dependent.

14 The Ontario Disability Support Program is delivered by the Ministry through nine regional offices. Individuals may apply for benefits through a local Ontario Works or Ontario Disability Support Program Office. The first step in the application process is for financial eligibility to be confirmed. If financial eligibility is confirmed, the individual is given a Disability Determination Package, and the case is referred to the Disability Adjudication Unit. Persons in a prescribed class such as individuals in certain listed residential facilities do not require adjudication by the Disability Adjudication Unit. [4] The Disability Determination Package consists of three forms, a Health Status Report and Activities of Daily Living Index, a Self-Report form (optional), and a Consent to Release of Medical Information form. The Health Status Report and Activities of Daily Living Index form is to be completed by a family doctor, specialist or other listed licenced practitioner. This form contains questions relating to medical history, prognosis, level of assistance required, and nature and degree of impairment. The Ministry instructs applicants that the forms must be completed and submitted to the Disability Adjudication Unit within 90 days.[5]

15 The Disability Adjudication Unit consists of a multi-disciplinary team of staff, including nurses, occupational therapists and rehabilitation counselors. The unit is responsible for deciding whether or not an applicant has a substantial physical or mental impairment and whether the impairment results in substantial restrictions in the activities of daily living.

16 If an applicant is denied benefits, they can request an internal review within 10 days of receiving the notice of decision. According to s. 59 (1) of the regulations under the *Ontario Disability Support Program Act, 1997*, the Disability Adjudication Unit has 10 days from the receipt of the request to complete a review and advise the applicant in writing. If the applicant is turned down at the internal review stage, they may still appeal to the independent adjudicative body, the Social Benefits Tribunal within 30 days of receiving the internal review

[4] s.4, O.Reg.222/98

[5] Under s. 16(5) O. Reg 222/98 applications are deemed to be withdrawn if they have not been completed within 90 days unless the Director approves a greater period of time for completion, and no appeal of a deemed withdrawal is available to the Social Benefits Tribunal (s.57(3)).

decision. Applicants may also request that the Tribunal reconsider a decision, and Tribunal decisions may be appealed to the Divisional Court on a question of law. The Disability Adjudication Unit is responsible for conducting internal reviews of decisions, and preparing submissions for Social Benefits Tribunal appeals.

17 According to Ministry policy, there is supposed to be a seamless transition for children with disabilities who are approaching 18 years of age, and will likely require income support under the Ontario Disability Support Program. Children receiving support under the Assistance for Children with Severe Disabilities program administered through the Ministry of Children and Youth Services are to be specifically identified. The Ministry's policy indicates that in these cases an application for assistance may be taken to determine financial eligibility six months prior to an applicant's 18th birthday.[6] This procedure is supposed to apply even if the child is not in receipt of Assistance for Children with Severe Disabilities benefits.[7]

18 Given the general program parameters, it is not obvious why the Ontario Disability Support Program went off track. However, when one examines the situation closer one finds that even as the Program was being conceived, Ministry officials drastically underestimated the demands that it would be faced with.

Getting Off Track

19 On March 15, 2006, the fact that our Office was investigating the issue of delay at the Disability Adjudication Unit was announced in the media. The next day, Sandra Pupatello, the then Minister of Community and Social Services, was quoted publicly as stating that the backlog in approving disability allowances was unacceptable. The Minister stated that she had known about the problem for at least six months and that the Ministry had been conducting an internal review.

20 The Ombudsman's Office has been addressing individual complaints about delays at the Disability Adjudication Unit since the Program's inception. In the early days, the Office was told that delays resulted from problems associated with the transition from the old Family Benefits model to the new Program. A labour dispute in 2002 further affected the processing of applications. However, as the excuses changed, the issue remained the same. Individuals were still finding themselves waiting for extended periods for decisions on their Ontario Disability

[6] Ontario Disability Support Program – Income Support Directive 1.2 Disability Adjudication Process page 4, - while applications can be received income support cannot be granted until the person is 18 years of age

[7] July 17, 2001 Memorandum, Ontario Works Policy Bulletin #2001-09, ODSP Policy Bulletin #008-2001

Support Program applications. As time passed, it became obvious even to Ministry officials that the crux of the problem was a basic one - the Unit was understaffed. Staffing for the Disability Adjudication Unit had been based on a projection that it would receive approximately 400 applications per week.[8] This figure proved overly optimistic. By 2003, the Unit was receiving 600 applications per week.[9] In 2004, 32,000 medical applications were received, but there was a capacity to complete only 28,000.[10] The Disability Adjudication Unit is currently receiving an average of up to 700 applications a week.[11] Adding to its workload, the Unit has also had to contend with a substantial number of applications in which a crucial question has not been answered or further medical information is required.[12]

21 Officials at the Program have been well aware of the stifling delays that have plagued the Program for many years. In a report prepared in 2003 by the Income Security Advocacy Centre, entitled *Denial By Design… The Ontario Disability Support Program* it was noted that:

> While the time frame for the adjudication process has decreased significantly from the early years of the ODSPA, it can still take three to four months for the DAU to make a decision on a file. For an applicant who is determined by the DAU to be a "person with a disability", the time lag between first applying for ODSP and actually receiving benefits can be as long as nine months. In the meantime, that person is forced to survive on meagre OW (Ontario Works) benefits, or no income at all.

22 In an effort to address delay problems, in 2003 the Disability Adjudication Unit adopted a "triage" process to expedite applications where the medical evidence clearly identifies the applicant as a "person with a disability". All incoming applications are to be reviewed through the triage adjudication process within 10 days. Approximately 20 per cent of all triage files result in the applicant being found to be disabled and the application being accepted. Triage Guidelines were prepared in 2004 by the Chief Medical Advisor. The preamble to the Guidelines state that triage guidelines are to be used to rapidly identify and allow quick processing of cases with a high likelihood of being judged eligible for benefits

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[8] Ministry document entitled Relevant Information from the ODSP 2006/2007 Results-based Planning Activity Note pertaining to the DAU on December 6, 2005

[9] Provincial Auditor, Annual Report 2004, page 87

[10] Ministry document entitled Relevant Information from the ODSP 2006/2007 Results-based Planning Activity Note pertaining to the DAU on December 6, 2005

[11] Ministry document entitled Relevant Information from the ODSP 2006/2007 Results-based Planning Activity Note pertaining to the DAU on December 6, 2005

[12] In 2003 the number of applications where this was a problem was approximately 56 per cent, see Provincial Auditor, Annual Report 2004, page 87

and further that clients whose diseases are likely terminal should have their cases expedited.

23 The Ministry also provided for fast tracking of files in a number of circumstances. For instance, at triage all files of applicants between the ages of 17 to 19 are to be reviewed to determine if the applicant is receiving benefits from the Assistance for Children with Severe Disabilities program. These cases are to be fast tracked for immediate adjudication to facilitate the seamless transition of such children from this program to ODSP as they become adults. The Ministry's Disability Adjudication Unit Procedures Manual also indicates that one of the reasons a file can be fast tracked is if there is a delay due to Ministry error.

24 The situation at the Program has also drawn the criticism of the Provincial Auditor (now the Auditor General). The Provincial Auditor considered the Program's expenditures and procedures during the 2002/03 and 2003/04 fiscal years. One of the more significant observations in the Provincial Auditor's 2004 Report was that:

> For many applicants, initial disability assessments were not completed on a timely basis, which often adversely affected the benefits eligible applicants received. We did find, however, that, for the approximately one-quarter of applicants who were clearly eligible, the introduction of a new triage process has expedited the granting of assistance to them.

One of the recommendations the Provincial Auditor made in the report was that the Ministry should:

> …take the steps necessary to ensure that all initial eligibility determinations are completed within four months, or approximately 80 business days, following the receipt of a completed application.

25 The Ministry was aware of the Auditor's initial findings by at least May 2004.[13] The Ministry responded to the Auditor's recommendation regarding eligibility determinations by stating that it agreed and had already taken steps so that all initial eligibility determinations were completed within four months following the receipt of a completed application. Ministry documentation shows that this response was put forward in a September 2004 presentation to the Minister. We

[13] May 3, 2004 internal Ministry Memorandum re: ODSP Provincial Audit

attempted to obtain confirmation from the Ministry concerning the basis for its position that it was meeting the time frame at this point. On March 2, 2006, we made a general request to the Ministry to provide us with statistical information for applications received over the two-year period ending February 1, 2006, showing processing times for each stage of the application review process. While we were initially provided with some statistical information, it did not provide specific information about what was happening around September 2004. When we asked directly what statistics had been used as a basis for advising the Auditor General that the Disability Adjudication Unit was meeting the four-month processing time, we were told by two Ministry officials that this information was based on a physical review of the file room.

26 In response to my Office's preliminary report, the Deputy Minister advised that the physical review of the chronological age of the application files in the file room would have been used only as an extra step to confirm the accuracy of a statistical report. He stated that the information provided to the Auditor General was based on the Disability Adjudication Unit's weekly Statistical Reports. We had been unaware of the existence of these reports, which had not been provided earlier. A review of these reports indicated that the Disability Adjudication Unit's inventory of cases awaiting adjudication in September 2004 was under four months old.

27 According to the Senior Manager of the Disability Adjudication Unit his records show that the unit went over the four-month time frame for adjudicating applications around the end of November 2004. The weekly Statistical Reports confirm that the Unit fell behind in November.

28 The Ministry's introduction of triage was a useful measure, but its effectiveness was limited in the face of mounting application backlogs. The Ministry continued to tinker with the triage process in an effort to reduce the time applications sat dormant. In a March 11, 2005 memorandum to Disability Adjudication Unit staff from a Senior Manager it is noted:

> Recently, it has been brought to the attention of the DAU Managers that a number of files seen at Initial Adjudication potentially could have been passed at the Triage. In such cases, the client – who is more than likely a person with a disability, is subject to an increased adjudication time period.
>
> Adjudicators are reminded that when it is determined that a case seen at Triage would likely pass at Initial Adjudication, then that case is to be passed at Triage.

> Recognizing that a large number of Triage files (that are potential passes) can present with an abundance of medical information, or require more thorough analysis for the setting of review dates, we ask that the Triage Adjudicator bundle these files with an elastic band, and mark them with the attached "Triage Expedite Adjudication" cover sheet. By clearly distinguishing these files, the file room staff will be able to distribute them for Initial Adjudication immediately, thereby avoiding any lengthy wait time.

29 The Disability Adjudication Unit introduced further streamlining measures on July 8, 2005. Cases being triaged were to be identified as belonging to one of six broad categories of major presenting conditions and forwarded to a specific adjudicator with expertise or interest in the appropriate area.[14]

30 Unfortunately, these band-aid solutions were inadequate to stem the backlog tide. In the case of Lyndsey Aukema, which is featured at the beginning of this report, the triage process clearly failed. It is apparent to anyone reading the list of Lyndsey's symptoms that she is a person with a substantial impairment entitled to benefits under the *Ontario Disability Support Program Act, 1997*. As the Disability Adjudication Unit noted in its Initial Application Adjudication Summary, Lyndsey is substantially impaired as a result of myotonic dystrophy, cerebral palsy and mental retardation. The documentation supporting Lyndsey's application noted that she had eight out of 13 severe symptoms and 17 out of 24 severe limitations. Incredibly, it took the Program eight months to figure out that she was a person with a substantial disability. In addition, Lyndsey was a child with a disability when she applied, and her case should have been flagged for fast tracking.

31 When it comes to adjudication of disabilities Lyndsey Aukema's case should have been a slam-dunk. So how did Lyndsey's case get overlooked? Henry Aukema may have hit the nail on the head when he noted that Lyndsey's doctor sent in 75 pages of supporting medical evidence. He commented that, "maybe that was a mistake because it snowed them under, they saw that thick file and oh we'll do that another day, that may be what happened." The Senior Manager of the Disability Adjudication Unit echoes Mr. Aukema's thoughts. When he was asked about what happened in the Aukema case, he acknowledged it should have been caught at the triage stage. He commented that:

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[14] July 8, 2005 Memorandum from the Senior Manager to All Staff Disability Adjudication Unit

> ...normally the thicker files tend not to be passed as often [at triage] ...in any case this one should have been passed and we blew it at triage, no question about it.

32 The Ministry's response to increasing backlogs in the Ontario Disability Support Program was a reactive one. It adopted a number of stopgap measures refusing to acknowledge and deal with the fact that the Program was unprepared and inadequately resourced to handle the work that it had. In addition to triage a number of operational changes were undertaken to try to fend off backlogs as they emerged in different areas of the Program's administration.

The Finger in the Dike Approach to Managing Delays

33 The average time it takes for the Disability Adjudication Unit to process cases has continued to snowball. Ministry officials have advised that currently the average processing time for applications that are not decided at the triage stage is eight months. For years the steps that the Program took to try to cope with the increasing volume of applications were insufficient and of only temporary assistance. While, steps were taken to stem the flood of work in one area of the Program, they led to a crisis in another.

34 In November 2004, the Ombudsman's Office was investigating issues of delay at the Disability Adjudication Unit. However, it was not a backlog in initial determinations that was of concern, it was delay in completing internal reviews of decisions denying entitlement. Subsection 59(1) of Ontario Regulation 222/98 under the *Ontario Disability Support Program Act, 1997*, requires that the Disability Adjudication Unit complete its internal reviews within 10 days. Not surprisingly, the Ministry was overwhelmed with internal review requests. It advised that it was receiving 40 per cent more applications than had been envisioned by the Program planners, and by May 31, 2004, the Unit had 1,500 cases that were beyond the mandatory time frame. At that time, the Ombudsman recommended that the Ministry meet the required time frame for reviews, and the Ministry undertook a number of measures that it anticipated would keep its internal reviews current by mid-January 2005.

35 What next occurred was that resources in the Disability Adjudication Unit were moved around to cover off the internal review backlog. Unfortunately, this resulted in the backlog re-emerging, this time in the initial adjudication area. The Ministry has indicated that the management of the unit faced competing demands and the actions taken were in the words of the Deputy Minister, a "legitimate

effort to manage these competing demands."[15] Staff were redirected to the internal review area in August 2004. After this point the pressure began to build in the initial adjudication area. The Senior Manager of the Disability Adjudication Unit confirmed that initially the unit did not think it was in a backlog situation. Additional staff continued to be used for internal reviews until February 2005. However, the unit had underestimated the impact of the increased hearings the Social Benefits Tribunal started setting in January 2005 to reduce their backlog. The Senior manager of the Unit noted in an electronic message to our Office of March 21, 2006 that:

> I think we realized that we weren't going to reduce our backlog around the end of March, 2005. Over the next few months we tried a number of strategies to reduce adjudication time including streaming files to adjudicators strengths but we could not overcome this issue.

The Ministry continued for months to desperately shuffle resources. Finally, by November 2005, the Ministry had exhausted its efforts and began the process of obtaining additional resources.

36 A Ministry Briefing Note prepared November 2, 2005 stated that the Disability Adjudication Unit was unable to meet the workload demands of adjudicating initial applications for Ontario Disability Support Program benefits while sustaining the legislated time frames of the internal review and Social Benefits Tribunal appeal processes. It was noted that the Disability Adjudication Unit had been continuing to implement efficiencies in an attempt to address the increasing workload demands, but that these had had minimal impact in reducing the wait times at the initial adjudication stage. In another last ditch effort, on November 7, 2005 the former Director of the Social Assistance and Municipal Operations Branch advised the Acting Assistant Deputy Minister that she intended to convert existing Case Presenting Officer positions to Disability Determination Adjudicator positions on a temporary basis.[16]

37 Every year the Ministry engages in what is referred to now in the Ontario government as "results-based planning." This is the process by which the various Ministries establish their priorities and budget needs. The Acting Director, Social Assistance and Municipal Operations Branch, advised my investigators that the Ministry has been working on its results-based planning proposal since around September 2005. As part of that process, the Ministry finally requested additional resources to enable it to cope with the volume of work in the Ontario Disability

[15] May 17, 2006 letter from the Deputy Minister to the Ombudsman.
[16] November 7, 2005 Memorandum from the Director to the Assistant Deputy Minister

Support Program. We obtained a draft Briefing Presentation to Deputy Minister Costante dated February 2006. The Briefing highlights an annual shortfall in the Disability Adjudication Unit's processing capacity of 8,000, and an approximate adjudication backlog as of February 28, 2006 of 13-14,000 cases. It was proposed that 12 full time staff be added to the Unit. The plan also calls for a part-time Assistant Chief Medical Adviser. The estimated one time costs were $207,600. The estimated ongoing costs for expanding the capacity of the Disability Adjudication Unit are over $900,000. The Ministry has also undertaken a program of additional overtime hours. Using the overtime initiative the Disability Adjudication Unit had completed reviews of over 1,000 cases by March 20, 2006.[17]

38 On March 24, 2006, the Deputy Minister wrote to my Office to confirm that the provincial budget announced March 23, 2006, included the resources requested to address the application processing delays at the Disability Adjudication Unit. The Ministry's expectation is that hiring will be completed by July 2006, and that there will be a reduction in timeframes for processing applications to less than four months by the end of the calendar year.

39 Delay alone is an extremely serious issue when one considers that the personal stake of applicants in the Ontario Disability Support Program process is extremely high. These are individuals who suffer from substantial disabilities, are without adequate funds to support themselves, and more often than not, are unable to participate in the workforce. While some may qualify for the lower paying Ontario Works program, many have no source of income at all while they are waiting for their applications to be adjudicated. Up to this point, I have concentrated primarily on discussing the question of delay itself at the Disability Adjudication Unit. However, there is another, in some ways a more invidious problem, and that is the restriction on retroactive benefit entitlement. In addition to being faced with delays, applicants are restricted by regulation to receiving only four months of retroactive benefits no matter how long the Disability Adjudication Unit takes to process their case.

[17] March 20, 2006 interview with Senior Manager, Disability Adjudication Unit

Adding Insult to Injury

40 The regulations under the *Ontario Disability Support Program Act, 1997* limit the amount of retroactive entitlement available to an applicant. In the case of individuals who apply directly to the Ontario Disability Support Program subsection 17(1) of Ontario regulation 222/98 provides that:

> The effective date of an applicant's eligibility for income support is the later of,
>
> (a) the day on which the application is complete; and
>
> (b) the day that is four months before the Director determines the applicant's eligibility.

In the case of individuals who apply for Ontario Disability Support Program benefits while receiving basic financial assistance under the *Ontario Works Act, 1997*, the language is slightly different. [18] In such cases, subsection 17(2) provides that

> … the effective date of the applicant's eligibility for income support is the later of,
>
> (b) the first day of the month following the month in which the application is complete; and
>
> (b) the first day of the month that is four months before the month in which the Director determines the applicant's eligibility.

41 In accordance with the Ontario Disability Support Program's Directive 1.4 entitled *Date of Grant*, the date an application is complete is considered the date that the Disability Adjudication Unit received the completed Disability Determination Package for the purposes of section 17. The date of eligibility determination means the date on the letter that is sent from the Disability Adjudication Unit to the applicant indicating that the applicant has been determined to be a person with a disability. Where an application is initially refused, if the decision is reversed based on the same medical condition through internal review or after an appeal to the Social Benefits Tribunal, the date of

[18] For these individuals the date of grant is always the first of the month, Ontario Disability Support Program – Income Support, Directive 1.4 Date of Grant

eligibility determination refers back to the first letter that was sent initially denying entitlement.

42 We had some difficulty trying to nail down the rationale behind the four-month retroactivity rule. At one point, we were told that it was essentially inherited from the *Family Benefits Act.* In a briefing presentation prepared for Deputy Minister Costante dated February 2006, it is suggested that the four-month limit on retroactivity is actually a performance standard for the adjudication of applications:

> For the most part, delivery standards are in policy, not regulation. This 4 month standard for completing the adjudication process is an exception.

43 The briefing recommends that the four-month standard be moved "*from regulation to policy, consistent with the general approach to delivery standards*".

44 Delivery standards are supposed to be a good thing for the public. They are goals that the public service strives to achieve to benefit Ontario's citizens. If the regulation limiting retroactive benefits to four months was indeed intended as a means of imposing service standards on the Ministry, it defies logic and has in practice served to penalize deserving applicants, rather than create an incentive for Ministry staff, adding insult to the injury already incurred as a result of systemic delays.

Refusal to Use Discretion to Provide Relief

45 It seems beyond obvious that a seriously disabled, impoverished, individual should not lose out on benefits they would otherwise be entitled to, solely by reason of the Ministry's delay or error in processing a benefit application. In fact, the Ministry itself used to recognize that to penalize an applicant for its own delays and errors would be grossly unfair. Like the *Ontario Disability Support Program Act, 1997* regulations, *Family Benefits Act* regulations (s. 14(3), O. Reg. 366) restrict retroactive social assistance benefits to four months. Section 8 of the *Family Benefits Act*, permits the Lieutenant Governor in Council, essentially the Cabinet, to direct payment of a benefit, in special circumstances, to an applicant who is otherwise ineligible. The Ministry's November 1, 1993 *FBA Policy and Procedural Guidelines*, provided that an order in council could be requested to provide family benefit arrears beyond the allowable period when the Ministry was totally responsible for the delay or a decision was delayed because of an administrative oversight. The Ombudsman's Office was involved in a number of

cases involving Ministry delay and error, the last in 1998, in which section 8 was used to provide retroactive benefits beyond four months.

46 The *Ontario Disability Support Program Act, 1997* which came into force June 1, 1998 contains a virtually identical provision (section 6), designating the Lieutenant Governor in Council with the authority to provide income support to a person who is not eligible in "*exceptional circumstances*." However, the Ministry has not used section 6 to mitigate the effects of its systemic delays on recipients for Ontario Disability Support Program benefits. The Director of the Ontario Disability Support Program informed our Office that she was not aware of any instances in which section 6 had ever been applied for this reason.

47 There is another section of the *Ontario Disability Support Program Act, 1997* that might also be used to provide relief for innocent applicants who have been victims of the Ministry's delay. Subsection 20(1) provides that a decision of the Director shall be effective from the date fixed by the Director, whether it is before, on or after the date of the decision. The Director of the Ontario Disability Support Program advised that this section is used to provide retroactive adjustments when there is new information about an application such as a change in asset levels or a change in family size. However, she did not believe that this section was used for situations in which there had been a processing delay on the part of the Disability Adjudication Unit.

48 The Ministry did modify its approach to the "date of grant" in 2002 to reflect a labour disruption. In 2002, the Ministry adopted a policy to modify the effective dates of decisions to ensure that applicants were not unfairly impacted by delays caused by a labour disruption. Even as recently as last year, our Office received a number of complaints relating to delays and administrative errors resulting in lost benefits. In these cases we were effectively able to intervene in and convince the Ministry to change the effective date of its decision in order to obtain full retroactive benefits for the individuals. For instance, we were able to assist a stroke victim, who uses a wheelchair, who had submitted his application with the assistance of hospital staff in February 2002. In that case, it took the Disability Adjudication Unit six months just to determine that more information was needed. We were able to convince the Ministry to use February 2002 as the benefit start date. However, more recently the Ministry's standard response to requests to change effective dates for decisions due to delay has been that it has no discretion and must rigidly apply the four-month cut off limit for retroactive benefits.

Solving the Retroactivity Problem

49 In the draft February 2006 Briefing Presentation to the Deputy Minister, the issue of the four-month limit is discussed. The Briefing refers to the fact that, "*Often, this delay is beyond the control of the applicant*," and proposes that in order to allow for retroactive payments in the exceptional event of a determination taking longer than four months, the regulation be amended to remove the four-month limit. The considerations listed include that this change would address the fairness issue raised by key stakeholders including the Ombudsman's Office and legal clinics, allow for the grant date to be the date a full application was made, and would minimize the number of appeals to the Social Benefits Tribunal regarding the date of grant. Given the proposal to increase resources for the Disability Adjudication Unit and employ an overtime strategy, it is also noted that the change is not expected to have cost impacts. The Director of the Ontario Disability Support Program confirmed that the proposal was going up through the approvals process at the Ministry. If adopted, she speculated that it would take until May or June 2006 to complete the regulatory drafting phase to eliminate the four-month limit.

Who are the Losers in the Waiting Game?

50 It is a good thing that the Ministry appears to be moving in the direction of eliminating the four-month retroactivity limit. It is a travesty that it was imbedded in the Program in the first place. However, the question remains what reparations is the Ministry prepared to make to those who have been denied benefits they would have been otherwise entitled to as a result? The Director of the Ontario Disability Support Program informed us that restitution for those disentitled to benefits as a result of delays and the application of the four-month rule has never been discussed. I believe that before dealing with this question it is important that the people behind the applications are brought into view, so that we can see who has truly lost in this waiting game.

51 Even giving the Ministry the benefit of the doubt and accepting that it was meeting the four-month standard for processing Ontario Disability Support Program applications by September 2004, its ability to meet this standard was very short-lived. In the case of Jane Doe[19], her completed filing package was received August 26, 2004. The Disability Adjudication Unit sent her a letter four days later, confirming receipt of her application and indicating that she would be notified in writing of a decision within eight weeks. Like the Aukemas, she was

[19] At Ms Doe's request, her real name is being kept anonymous, but the case is real.

advised that staff would not be able to advise her of a decision over the telephone. So Ms Doe waited. Eight weeks of waiting stretched into five months before the Disability Adjudication Unit contacted her again. However, it hadn't reached a decision yet. Instead, it wrote February 7, 2005 requesting further medical information, which Ms Doe provided by March 29, 2005. It was another month and a half, May 13, 2005, when she was sent a letter advising her she did not qualify for benefits. Ms Doe, who suffers from multiple health ailments, including severe depression and cardiac problems, did not give up. She went on to request reconsideration and launch an appeal to the Social Benefits Tribunal.

52 After years of battling the system, 59-year-old Jane Doe was finally able to convince the Disability Adjudication Unit on February 1, 2006, over a year after filing her initial application, that she was a person with a disability entitled to Ontario Disability Support Program benefits. But to add insult to injury, Ms Doe was rewarded for her persistence, by being denied four months of retroactive benefit entitlement, which for her was the difference between Ontario Works and Ontario Disability Support Program benefits.[20] At some point, her application had fallen into a black hole in the Disability Adjudication Unit, from which it did not resurface for five months. Through no fault of her own, Jane Doe had paid the penalty.

53 According to the Ministry's records, Dan Nolan's application for Ontario Disability Support Program benefits was received August 31, 2004, and the referral to the Disability Adjudication Unit was completed September 1, 2004. By this point, the unit was supposed to be processing applications within four months. Mr. Nolan did not receive a decision until April 28, 2005, eight months later. He was initially denied benefits, and it was not until the Social Benefits Tribunal reviewed his case on November 3, 2005, that he was determined to be substantially disabled.

54 As a result of the Disability Adjudication Unit's delay in processing his application, Dan Nolan lost out on the difference between Ontario Works benefits and Ontario Disability Support Program benefits for two months. This was not an inconsequential amount for Dan Nolan, a single father trying to provide for his ten-year-old daughter. While Dan Nolan's application sat in a file room

[20] The date of retroactive grant for Ontario Disability Support Program recipients who have been receiving Ontario Works benefits is determined in accordance with s.17 (2) O. Reg. 222/98, which provides that the effective date of grant is the later of the first day of the month following the month the application is complete and; the first day of the month that is four months before the month in which the Director determines the applicant's eligibility. When the Disability Adjudication Unit reverses an earlier decision prior to an appeal being heard by the Social Benefits Tribunal, the date of the first letter informing the applicant that they were not disabled is used as the date on which the Director determines the applicant's eligibility for the retroactivity rules (see Ontario Disability Support Program – Income Support, Directive 1.4 Date of Grant.)

untouched and unconsidered, he reported that he and his daughter went without. He didn't have sufficient funds for groceries. His daughter wore a second-hand winter coat, and had no winter boots. Instead of having a tooth repaired, Mr. Nolan eventually had to have it extracted.

55 Dan Nolan's situation is not unique. We heard from a number of Community Legal Clinics about clients forced to rely on food banks and substandard accommodation, while waiting for the Disability Adjudication Unit to process their applications.

56 Dianna Wyatt's Ontario Disability Support Program application was received January 31, 2005. She says that when she called the Disability Adjudication Unit office in Toronto three months later she was told "not to call us, we'll call you." She did not receive a decision confirming her entitlement for benefits, until September 15, 2005. This delay resulted in her losing out on the difference between Ontario Works and Ontario Disability Support Program benefits for three months. Dianna describes the hardship and humiliation she experienced during the waiting period. In desperation she sold whatever she could, her car, family heirlooms. Without a car and funds for public transportation, she was unable to make her doctor's appointments. She went to the Salvation Army, which helped her pay a bill, and called around at local churches for food. She went without milk, fruits and vegetables, often having to live off excess bread from the food bank. She did her laundry in her bathtub and could not afford personal grooming products. Dianna rails against a system that she feels treated her as less than human, stating:

> We are talking about people's lives… what I need is to be able to buy food, I need to be able to keep myself clean, I need some dignity, some respect, treat me like a human being not a number…

57 Dianna simply doesn't understand how she, a woman with substantial disabilities and no resources, became responsible for the consequences of the Disability Adjudication Unit's delay, she comments:

> It does not seem reasonable to me that they take 9 months to make a decision as to my eligibility on a completed application. Through no fault of my own I had to wait 9 months for a decision. Then I am penalized for the delay. I have lost money and benefits not to mention the additional stress and distress caused because there just wasn't enough to cover basic needs and having to contact charities just so I can eat.

58 For those already suffering from emotional and psychological problems the interminable stress of waiting for a Disability Adjudication Unit decision can be excruciating, the indifference of the Ontario Disability Support Program the ultimate insult. At times, individuals become desperate. In one case we received a call from a woman who was on the brink of suicide. One community clinic worker observed to our Office that:

> The Ministry is rewarded for providing poor customer service. This is particularly unfair to this group of people who are so vulnerable as we are talking about disabled people who are so needy.

59 Katherine Smith initially applied for benefits in December 2004. Her supporting medical information was received and her application considered complete on February 18, 2005. On November 1, 2005, her application was denied. However, this decision was reversed on January 27, 2006. The date to be used for determining retroactive entitlement was four months before November 1, 2005. This meant that Ms Smith, who suffers from lupus and pericarditis, like thousands of others, lost out on retroactive benefits, in her case four and a half months' worth.[21]

60 Scott Eaton suffers from multiple sclerosis, and was one of the unlucky applicants who applied for Ontario Disability Support Program benefits during a time when the Disability Adjudication Unit was particularly deluged and beyond its capacity. His completed filing package was received March 17, 2005. It took the Disability Adjudication Unit over eight months to decide that he was not entitled to benefits. At least by then the reconsideration process was doing somewhat better. He did not receive his reconsideration decision within the mandated 10 days, but within 25 days, by December 30, 2005, the Disability Adjudication Unit had reversed its decision of December 5, 2005, and found him entitled to benefits. Scott's success was marred by the fact that he lost out on the difference between Ontario Works and Ontario Disability Support Program benefits for four months. Through no fault of his own, and owing to circumstances beyond his control, Scott Eaton had paid the price for an overburdened bureaucracy.

61 Like Lindsey Aukema, Kenneth Hansen was supposed to receive prioritized, fast tracked service from the Ontario Disability Support Program. His family had been receiving support from the Assistance for Children with Severe Disabilities

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[21] When a recipient has applied directly to the Ontario Disability Support Program for benefits s.17 (1) of O. Reg. 222/98 provides that the date of benefit grant is the later of the day on which the application is complete; and the day that is four months before the Director determines the applicant's eligibility. When the Disability Adjudication Unit reverses an earlier decision denying entitlement, the date of the original denial letter is used as the date of eligibility determination.

program to help with the costs associated with raising Kenneth, who has multiple disabilities. Six months before Kenneth turned 18 years of age, his family received a letter advising that he should apply for Ontario Disability Support Program benefits. The plan was for Kenneth to apply early, so his benefits would be in place by his 18th birthday on April 3, 2005. Kenneth's completed application was not received by the Disability Adjudication Unit until March 18, 2005. Although it was received close to his birthday, it should have been flagged for priority service. It was not. Kenneth's birthday came and went without a response from the Unit. By the summer of 2005, Kenneth was growing anxious. When he contacted the Program trying to find out what was happening with his application, he was told no information could be provided over the phone. It was not until December 1, 2005, over eight months later, that Kenneth finally received a decision. Unfortunately, he was initially denied benefits, and it was not until February 21, 2006, that an internal review approved his grant based on the same information. While Kenneth was able to obtain Ontario Works assistance, he lost out on the difference between Ontario Works benefits and Ontario Disability Support Program benefits, for four months.

Fruitless Appeals

62 If another government program were to systematically restrict payments to individuals as a result of its own delays, one might expect to hear wide-spread public uproar. However, the Ontario Disability Support Program deals with individuals who are by definition vulnerable. They are often used to an officious system they feel powerless to challenge, and are often too intimidated to come forward and complain. After losing out on benefits purely because of the delay in handling of their applications by an overburdened bureaucracy, some complainants face further frustration when they attempt to seek redress through the internal review and appeal process. Ontario Disability Support Program recipients waste more time and energy, and government resources are squandered, while retroactivity decisions are challenged without any reasonable prospect of success.

63 When Lyndsey Aukema received her January 20, 2006 letter telling her that she was limited to four months retroactive benefits, she was also informed that an internal review of the decision could be requested by January 31, 2006. Henry Aukema promptly requested a review of the Ministry's decision.

64 The Ministry takes the position that it has a legislative responsibility to inform all clients of their right to appeal without comment as to potential merits of any

appeal. What Mr. Aukema did not know however was that requesting a review of the decision to limit retroactivity was a pointless exercise. A February 7, 2006 letter from the Program responding to Mr. Aukema's review request simply referred him to the regulation limiting entitlement to four months retroactive benefits, and confirmed that no additional benefits could be given. He was also advised that he could appeal that decision to the Social Benefits Tribunal. Although he has appealed, once again this exercise is futile. The Social Benefits Tribunal has already determined that there is no flexibility or room for interpretation in the regulation. As one Tribunal member noted:

> … the Tribunal agrees that the arbitrary date of "four months" before the decision date is not fair to the applicant. If the delay is because of lost files, holidays, workload or other miscellaneous reasons, how is it fair to the disabled person to lose eligibility when he has done all that was required of him? His fate, and allowance, should not hinge on the foibles of a busy bureaucracy. ….The law, however, is the law.[22]

The Damage in Numbers

65 According to the Ministry's statistics, during the period from April 1, 2004 to December 31, 2005, at least 4,630 disabled individuals went without the difference in income between Ontario Works and Ontario Disability Support Program benefits or went without benefits entirely for substantial periods of time. This does not even include those who were initially turned down, but were later determined to be entitled to benefits through an internal review by the Disability Adjudication Unit (1,676), the submission of additional information prior to a Social Benefits Tribunal hearing (2,377), or found entitled to benefits on appeal to the Social Benefits Tribunal (4,804). Many of these individuals would also have experienced delays and a loss of retroactive entitlement. Since the inception of the Ontario Disability Support Program, it appears that thousands of individuals found entitled by reason of disability to social assistance have cumulatively contributed millions to the coffers of the Ontario government through technical disentitlement caused by the government's own failure to process their claims on time.

66 According to the Ontario Disability Support Program's Quarterly Statistics for the calendar year 2005, close to 6,000 individuals had to wait seven months or more for a medical decision after a complete Disability Determination Package was submitted. We were unable to determine how many individuals had to wait

[22] Tribunal File No. 027-04609 Hearing Date June 5, 2003

between over four months and under seven months for a decision during this period, as the Program statistics lump in those decisions that are completed within four months of receipt of an application with those that are completed within five and six months. This is quite mind-boggling given that four months is the service standard for adjudication of applications, and the fact that cases beyond four months are legally subject to retroactive disentitlement. Once again these figures do not include cases determined eligible after an application had been initially turned down.

67 Additional statistics provided by the Ministry show that of 29,198 applications that were completed from April 1, 2004 to March 31, 2005, and that received a decision as of February 28, 2006, 41per cent were over four months old. Of these cases, 3,655 applicants were determined to be entitled to disability benefits. In the majority of these files, 1,673, there was a loss of one month of benefits, while 687 individuals lost out on two months of benefits, 725 on three months, 464 on four months, 62 on nine months and 44 on 10 plus months of retroactive entitlement. Troublingly, these statistics also show a consistent increase in the number of cases taking longer than six months for a decision. In the first quarter of 2005, 30 per cent of the applications had a decision within three months, 66 per cent had a medical decision within four to six months, while only 4 per cent had a decision between 7 to 12 months, and a small fraction, 0.02 per cent, were over 13 months. By the final quarter of the year, while 45 per cent of the applications received a medical decision within three months, only 5 per cent received a decision between 4 to 6 months, and a full 50 per cent did not receive a decision for 7 to 12 months.

68 Given the way the Ministry's statistics are kept, it is difficult to estimate with any exactitude, the total amount applicants have lost in benefit entitlements as a result of Disability Adjudication Unit delays. Using the statistics provided by the Ministry, we were able to determine that between April 1, 2004 and December 31, 2005, 4,630 individuals received an initial decision confirming entitlement to benefits beyond the four-month limit, resulting in loss of benefits. Another 8,857 applications were approved during this period through a combination of internal reviews, further medical reviews and Social Benefits Tribunal appeals. However, there is no statistical information on processing times for these cases. Of the 4,630 cases, which did not receive an initial medical decision until after four months, approximately 70 per cent would involve the difference between Ontario Works benefits and Ontario Disability Support Program benefits (a maximum of $423 per month for single person). Accordingly, it is not inconceivable that impoverished disabled Ontario Disability Support Program applicants lost over $6 million dollars in benefit entitlement from April 2004 to December 2005. The figure rises significantly if one adds in an estimate of those 8,857 individuals who

were granted benefits at some point after the initial adjudication stage. If the Ministry kept more comprehensive statistical information, it might be able to pinpoint the loss more accurately.

Changing the Rules of the Waiting Game

69 Lyndsey Aukema, Jane Doe, Dan Nolan, Dianna Wyatt, Katherine Smith, Scott Eaton, Kenneth Hansen, and the thousands like them that have been denied retroactive entitlement to Ontario Disability Support Program benefits as a result of Ministry delay, are not malingerers. They are not welfare fraud artists. They are the very persons the Ontario Disability Support Program was intended to serve. Together they have been deprived of millions of dollars in benefits because of Ministry delays. Money that should have gone towards ensuring that Dan Nolan's ten-year old daughter had boots to wear in the winter, and Dianna Wyatt had food to eat. It is clear that the rules of the waiting game need to change and they must change quickly.

70 While the Ministry has recently undertaken an overtime initiative, and requested and been granted additional funds to ensure that it meets a standard of four months for processing benefit applications, it will likely be the end of the 2006 calendar year before any real headway is made in tackling the existing backlog.

71 In addition, I am far from convinced that the standard of four months that the Ministry has set for itself is appropriate, given the purpose of the Program. The Ministry has been unable to explain the existence of the four-month standard other than to suggest that it is an historical remnant. There is no empirical evidence to suggest that four months is a reasonable time to take to process an application for disability benefits. In 2003, the Income Security Advocacy Centre was criticizing what were then delays of three to four months in rendering decisions on benefit entitlement. This is because those applying for Ontario Disability Support Program benefits are so uniquely at risk, often desperate, and any delay can have a shattering effect on the quality of their lives. It is important to keep these individuals in focus when one is addressing topics such as productivity and service standards, to ensure that the numbers do not overwhelm the individuals.

72 I wish to acknowledge that the Ministry staff which my Office have dealt with over the years, for the large part, work hard within the confines of the Program, to do the best they can, in the interest of those who come seeking assistance from the

Program. I am not convinced however, given the vulnerable citizens at stake, that the Ministry should continue to hold up four months as the gold standard for consideration of Ontario Disability Support Program applications. Internal reviews are supposed to be conducted in 10 days based on the same information. It is not clear why initial adjudication should take so much longer. I understand that there are always extenuating circumstances, particularly challenging cases, unusual facts, that might require additional time, but in the normal course it is unclear to me why it should take four months for the Disability Adjudication Unit to consider a completed application. Accordingly, I am recommending that **the Ministry review the service standard it sets for the adjudication of Ontario Disability Support Program applications and that it determine what the optimal processing time should be given the intent and purpose of the program and determine what staffing strategies are required to process Ontario Disability Support Program applications expeditiously.**

73 For a Program that gives lip service to the importance of enabling individuals to lead independent, productive and dignified lives, the Ministry's practices regarding client communication also leaves much to be desired. I believe it is important for government bureaucrats to remember it is not always just about money. Individuals waiting for decisions on their applications need to know that they matter. They need assurance that their applications have been received, are being considered, and they need to know when they can expect a decision. Applicants should not be left hanging indefinitely in limbo and told "don't call us, we'll call you." My examination of the Ontario Disability Support Program reveals that the adjudication process has left many trapped in a suspended state while their applications are pending. The overwhelmed and overburdened Ontario Disability Support Program staff do not even have the time to extend the basic courtesy to applicants of updating them about the status of their cases. Contact with the Disability Adjudication Unit is regularly discouraged. It is undoubtedly true that if the Ministry were to spend time updating applicants its process might become even more bogged down, but this is not a justification for ignoring the right of vulnerable citizens to know the status of their applications. Accordingly, I am recommending that **the Ministry establish appropriate service goals for the treatment of pending applications, including keeping in regular contact with applicants to advise them of the status of their applications and providing useful information by telephone where possible**.

74 It is unfair if even one person is disentitled to benefits retroactively because of Ontario Disability Support Program delays. It is nothing short of shameful when the program is responsible for thousands of vulnerable individuals losing out on benefits. The Ministry is finally taking steps to have the regulation that limits retroactivity of benefits to four months changed to eliminate this provision.

I am recommending that the Government of Ontario make this regulatory change immediately.

Making Things Right

75 Although I am hopeful that the Ministry's actions in ensuring that the 4-month regulation is repealed and improving its staffing levels and service standards will prevent future applicants from being deprived of their fair entitlement to benefits, I cannot ignore the egregious impact on those who have already lost significantly because of the effect of this regulation and the Ministry's endemic delays in processing applications. Their plight was compounded by the Ministry's position that it could not resort to the discretionary and exceptional provisions in the Act to ensure they received the monies they were entitled to.

76 I believe the only way to make this situation right is for those who have lost the waiting game, to receive the benefits they would have otherwise been entitled to if it were not for the Ministry's delay. But for the Ministry's delays, these individuals would have had funds to improve the quality of their lives, to buy food, do laundry and buy clothing for their children. They have been denied these funds through no fault of their own.

77 I am cognizant that restitution to those affected may involve millions of dollars. However, it should not be forgotten whose money this really should have been in the first place. If it had not been for the Ministry's delay each of those affected would have hundreds and some even thousands of dollars more in their pockets today to assist in providing for their basic needs.

78 Accordingly, I am recommending that **the Ministry pay retroactive benefits to all applicants to the Ontario Disability Support Program who were disentitled to benefits as a result of Ministry delays and the impact of the regulation limiting retroactive benefits to four months.**

79 Given the nature of these retroactive payments, i.e., they are restitution for monies individuals are rightly entitled to and deprived of only due to Ministry delays, **I am also recommending that any restitution paid to individuals should not be considered in determining their future entitlement to benefits.**

80 The Ministry will have to determine the best manner in which to implement these recommendations from a practical perspective.

Keeping Proper Statistics

81 I was very surprised during the course of this investigation at the state of the Ontario Disability Support Program's statistical information. Given the significance of the four-month retroactivity rule, and its existence as a service standard, one would have expected the Program to closely monitor those cases caught by the rule, and to determine the exact extent of the loss resulting from Ministry delays. However, as noted earlier, statistics about cases closed within four months were lumped in with those closed within five to six months blurring the lines between those cases where benefits were lost and those that came within the four-month standard. While I am recommending that the four-month retroactivity rule be eliminated, I believe there is value in keeping track of those cases that are processed outside of service standards. Accordingly, **I am recommending that in future the Ministry statistically track cases to determine with greater accuracy those that come within its standards and those that fall outside of those standards.**

Conclusion

82 The time has come to change the rules of the Ontario Disability Support Program waiting game. The Ministry must go back to first principles and remember why the Program exists in the first place; it is to serve low income Ontarians with disabilities. These individuals deserve to wait for the least amount of time possible for their applications to be decided. They deserve to know how long they can expect to wait for a decision. They deserve to be kept informed of the status of their applications, and they deserve to receive their full benefit entitlement once a decision has been made. These citizens should not be the losers in the waiting game. It is fundamentally unfair for Ontario Disability Support Program recipients to forfeit benefits as a result of Ministry delays. It is time for the Ministry to treat its clients with the respect they are entitled to, and restore the dignity that its past practices have served to destroy. In order to ensure that the implementation of my recommendations does not languish, **I am**

recommending that the Ministry report back to my Office in six months time regarding the steps it has taken to implement my recommendations.

Opinions

83 It is my opinion that the Ministry of Community and Social Services has failed to provide adequate service to applicants for Ontario Disability Support Program benefits and failed to effectively address excessive delays in the Program. Its conduct is unreasonable, unjust, oppressive and wrong under subsections 21 (1)(b) and (d) of the *Ombudsman Act*.

84 It is also my opinion that the Ministry of Community and Social Services' failure to provide full reimbursement of retroactive benefits to eligible Ontario Disability Support Program applicants is unreasonable, unjust, oppressive and wrong, and based on a practice or rule of law that is unreasonable, unjust and oppressive under subsections 21 (1)(b) and (d) of the *Ombudsman Act*.

Recommendations

85 I am making the following recommendations addressed at ensuring that the Ministry of Community and Social Services and the Government of Ontario improve the service provided to applicants for Ontario Disability Support Program benefits, and redress the unfairness of the current limit on retroactive benefit entitlement:

1. **That the Ministry of Community and Social Services review the service standards for the adjudication of Ontario Disability Support Program applications and determine what the optimal processing time should be given the intent and purpose of the program and determine what staffing strategies are required to process Ontario Disability Support Program applications expeditiously.**

   s. 21(3)(g) *Ombudsman Act*

2. **That the Ministry of Community and Social Services, establish appropriate service goals for the treatment of pending applications under the Ontario Disability Support Program, including keeping in regular contact with**

applicants to advise them of the status of their applications on a regular basis and providing useful information by telephone where possible.

s. 21(3)(g) *Ombudsman Act*

3. **That the Government of Ontario immediately amend section 17 of Ontario Regulation 222/98 under the *Ontario Disability Support Program Act, 1997* to eliminate the four-month restriction on retroactive benefit payment.**

   s. 21(3)(e),(g) *Ombudsman Act*

4. **That the Ministry of Community and Social Services pay retroactive benefits to all applicants to the Ontario Disability Support Program who were disentitled to benefits as a result of Ministry delays and the impact of section 17 of Ontario Regulation 222/98 under the *Ontario Disability Support Program Act, 1997* limiting retroactive benefits to four months.**

   s. 21(3)(g) *Ombudsman Act*

5. **That retroactive payments made for benefits lost as a result of Ontario Disability Support Program delays not be considered in determining future eligibility for benefits of those affected.**

   s. 21(3)(g) *Ombudsman Act*

6. **That the Ministry of Community and Social Services statistically track cases to determine with greater accuracy those that come within its service standards and those that fall outside of those standards.**

   s. 21(3)(g) *Ombudsman Act*

7. **That the Ministry of Community and Social Services report back to the Ombudsman in six months time on the results of its implementation of the Ombudsman's recommendations.**

   s. 21(3)(g) *Ombudsman Act*

RESPONSES

86 At the conclusion of my Office's investigation, a preliminary report and recommendations were provided to the Deputy Minister and the Minister of Community and Social Services for comment.

MINISTER'S RESPONSE

87 The Minister wrote to me on May 17, 2006, in response to my preliminary report. She stated that she took my report seriously and is committed to addressing the issues that I have raised. She advised that the Ministry would be addressing a number of my recommendations immediately and responding to others within the six-month report back period (**recommendation 7**). She also noted that in regard to my recommendation that the regulatory restriction on retroactive benefit entitlement be eliminated (**recommendation 3**); that the regulatory changes have recently been approved to this effect. She also advised that the Deputy Minister would provide further detail to address the specific concerns raised in my report. I am encouraged by the Minister's response.

DEPUTY MINISTER'S RESPONSE

88 In his May 17, 2006 written response to my preliminary report, the Deputy Minister expressed appreciation for the work that my Office had done in highlighting an important issue for the Ministry and its clients. He stated that the investments being made into additional staffing at the Disability Adjudication Unit, which are referenced in this report, would improve the timeliness of the application process. In addressing my recommendations, he stated that the Ministry has committed to reviewing the service standards and goals for the adjudication process taking into account additional resources (**recommendations 1 and 2**). He also advised that the Ministry is improving its statistical tracking to provide up-to-date information on service timeliness, and will explore ways that it can share that information with clients (**recommendations 2 and 6**). In addition, the Deputy indicated that the regulation was recently changed to eliminate the four-month restriction on retroactive benefit payment (**recommendation 3**).

89 In response to our request for clarification on the status of the regulatory change, the Ministry subsequently advised us that the amendment would not come into force until it is actually filed with the Registrar of Regulations. The Legislative Counsel Office advised us on May 18, 2006, that filing had not yet occurred.

90 The Deputy Minister undertook to report back in six months on the steps that have been taken to respond to my recommendations on the service improvements to the Ontario Disability Support Program (**recommendation 7**).

OUTSTANDING MATTERS

91 Although I am encouraged by the direction of the Ministry's response, it is not yet clear what position the Ministry will take with respect to what I see as one of the most important of my recommendations: restitution for those who have suffered as a result of the Disability Adjudication Unit's delays **(recommendations 4 and 5)**. The Deputy Minister only went so far as to state that the Ministry would be "considering" my recommendations with regard to retroactive payments. I do not consider this to be an adequate and appropriate response to my recommendations in the circumstances.

92 Although it is understandable that the Ministry may require time, particularly given the challenges posed by the way in which its statistics have been kept, in order to analyze the potential cost of paying restitution and the best methods of doing so, I would urge the Ministry to deal with this question with the sense of urgency that it rightfully deserves. My investigation has found that thousands of individuals with disabilities were deprived of benefits, which they were otherwise rightfully entitled to, due to the Ministry's delay and its application of the four-month regulated restriction on retroactive benefits. Many of those affected faced months of undeserved financial hardship and in the end lost out on much needed monies which should have been in their pockets to pay for food, shelter and other necessities of life. I would urge the Minister to act quickly and to find the necessary means to repay these individuals the monies which they should have received in the first place, had it not been for the Ministry's delay.

André Marin
Ombudsman

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May 25, 2006

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OMBUDSMAN ONTARIO
CORPORATE SERVICES

Mr. André Marin
Ombudsman
Ombudsman Ontario
483 Bay Street
10th Floor, South Tower
Toronto, Ontario
M5G 2C9

Dear Mr. Marin:

RE: Final Report

Thank you for your letter and Final Report dated May 19, 2006 concerning delays at the Ministry of Community and Social Services' Ontario Disability Support Program (ODSP) Disability Adjudication Unit (DAU).

I appreciate that you have accommodated the revisions that we have requested based on your preliminary report. I thank you for recognizing that the actions this government has taken address the majority of your recommendations. I assure you that the government is committed to giving careful consideration to your remaining recommendations and will report back to you within your requested six month timeframe.

I am pleased to advise you that the regulation to eliminate the four month restriction on retroactivity has been filed. Staff in the local offices have already been notified and, from now on, will be granting eligibility to the program retroactively back to the date of application.

Again, I would like to thank you and your staff for highlighting this important service issue to the ministry. We look forward to reporting back to you in six months on the improvements we have made.

Sincerely,

Madeleine Meilleur
Minister

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